IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 5, 2005

STATE OF TENNESSEE v. CHARLES E. ROBINSON

Appeal from the Circuit Court for Williamson County
No. II-103-022 Timothy L. Easter, Judge

No. M2004-01163-CCA-R3-CD - Filed August 17, 2005

The defendant, Charles E. Robinson, stands convicted of possession of a handgun by a convicted felon, *see* Tenn. Code Ann. § 39-17-1307(b)(1)(B) (2003), for which he received a three-year sentence. The defendant now brings this direct appeal of his conviction, alleging that the evidence is insufficient to support his conviction, that the trial court erred by allowing the state to introduce evidence that he is a convicted felon, and that he was denied a fair trial by the false testimony of a prosecution witness and by statements made by the prosecution during closing arguments that are tantamount to prosecutorial misconduct. After reviewing the record and applicable law, we affirm the judgment of the lower court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Jeffrey O. Powell, Nashville, Tennessee, for the Appellant, Charles E. Robinson.

Paul G. Summers, Attorney General & Reporter; Rachel E. Willis, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The following summarizes the evidence presented at the defendant's trial in the light most favorable to the state, as the jury's guilty verdict accredited this version of the evidence. *See State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). On November 12, 2002, the defendant's parole officer initiated a search of the defendant's residence because the defendant was suspected of harboring two fugitives. Officers from the Franklin Police Department executed the search. When the police entered the defendant's residence sometime after midnight, the defendant and several other people were present. The defendant was seated in his living room. A search of the residence

revealed a .22 caliber handgun, which was found in a container with the defendant's clothes in the defendant's bedroom. Between 30 and 60 .22 caliber bullets were found throughout the defendant's residence. When the police presented the gun to the defendant, his demeanor was "indifferent," and he later told the police that the gun was inoperable. At the time of trial, the defendant had two prior felony convictions, a 1992 conviction for sale of a controlled substance and a 1993 conviction for sale of cocaine.

Sufficiency of the Evidence

The defendant challenges the sufficiency of the evidence introduced at trial to support his conviction for possession of a handgun by a convicted felon. Our evidence-sufficiency review is conducted pursuant to well-settled principles. When an accused challenges the sufficiency of the evidence, an appellate court inspects the evidentiary landscape, including the direct and circumstantial contours, from the vantage point most agreeable to the prosecution. The reviewing court then decides whether the evidence and the inferences that flow therefrom permit any rational fact finder to conclude beyond a reasonable doubt that the defendant is guilty of the charged crime. *See* Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985); *State v. Dykes*, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

In determining sufficiency of the proof, the appellate court does not replay and reweigh the evidence. *See State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Witness credibility, the weight and value of the evidence, and factual disputes are entrusted to the finder of fact. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *Liakas v. State*, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); *Farmer v. State*, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). Simply stated, the reviewing court will not substitute its judgment for that of the trier of fact. Instead, the court extends to the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences that may be drawn from the evidence. *See Cabbage*, 571 S.W.2d at 835.

The defendant's conviction offense, possession of a handgun by a convicted felon, is defined as possession of a handgun by an individual convicted, *inter alia*, of a felony drug offense. Tenn. Code Ann. § 39-17-1307(b)(1)(B) (2003).

The defendant alleges that there is no evidence in the record to support a finding that he physically or constructively possessed the handgun. Tennessee courts recognize that possession may be either actual or constructive. *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001); *see also State v. Bigsby*, 40 S.W.3d 87, 90 (Tenn. Crim. App. 2000). Constructive possession occurs when a person knowingly has "'the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.'" *State v. Williams*, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981) (quoting *United States v. Craig*, 522 F.2d 29 (6th Cir. 1975)).

Viewed in the light most favorable to the state, the evidence establishes the defendant's constructive possession of the handgun. Police officers discovered the .22 caliber handgun in the defendant's bedroom, and the defendant informed the police that he used that room exclusively. Moreover, numerous .22 caliber bullets were found scattered throughout the defendant's residence. Furthermore, when presented with the handgun, the defendant did not register surprise, and he later informed the officer that "[i]t don't work," meaning that the gun was not in working condition. Based upon this evidence, we conclude that a jury could have reasonably determined that the defendant constructively possessed the handgun in question.

Furthermore, the evidence introduced at trial is also sufficient to support a finding that the defendant had been convicted of a felony drug offense. Judgments entered by the state established that the defendant had two prior felony drug convictions, a 1992 conviction for sale of a controlled substance and a 1993 conviction for sale of cocaine. Accordingly, there was sufficient evidence introduced at trial to support the elements of possession of a handgun by a convicted felon.

Admission of Evidence of Defendant's Prior Felony Drug Offense Convictions

The defendant argues that the trial court erred by admitting evidence that he had several felony drug convictions. Specifically, the defendant alleges that the trial court erroneously admitted this unduly prejudicial character evidence without engaging in the requisite analysis outlined in Tennessee Rules of Evidence 403 and 404. The defendant asserts that the court should have granted his request to take judicial notice of the defendant's status as a convicted felon, rather than allowing the introduction of the particulars of his prior convictions. The state counters that because the defendant's status as a convicted felon is a material element of his indicted offense, the probative value of the evidence outweighed any prejudicial effect.

In *State v. Wingard*, 891 S.W.2d 628 (Tenn. Crim. App. 1994), this court held that in the "unique situation" where a "prior conviction [i]s an element of the offense [charged], . . . the probative value of an essential element of the offense would almost always outweigh any potential prejudice under Rule 404(b), [and therefore the] specific nature of the offense w[ould be] admissible." *Id.* at 634. This holding was later limited to situations in which the defendant did not offer to stipulate to his or her status as a convicted felon. *See State v. James*, 81 S.W.3d 751, 763 n.7 (Tenn. 2002) ("We note that in *Wingard*, there is no evidence that the defendant offered to stipulate to his prior convictions. Accordingly, we find that the decision in *Wingard* remains good law in those situations where the defendant does not offer to stipulate to his or her prior offenses.").

In the instant case, the defendant's status as a convicted felon is an essential element of his offense. *See* Tenn. Code Ann. § 39-17-1307(b)(1)(B) (2003). Furthermore, there is no evidence in the record, nor does the defendant assert, that he offered to stipulate to his status as a convicted felon. Accordingly, we hold that the probative value of the evidence of the defendant's prior felony drug convictions outweighs any potential prejudicial effect. Moreover, we note that after defense counsel discussed concern about the potential prejudicial effect of the defendant's prior convictions, the trial court instructed the jurors that they could not consider those prior convictions

as evidence of the defendant's propensity to commit the crime of possession of a handgun by a convicted felon. Accordingly, we hold that the trial court properly admitted this evidence and took appropriate precautionary measures to safeguard against any potential resulting prejudice.

False Testimony

The defendant alleges that he was denied a fair trial because one of the state's witnesses, a police officer, testified falsely at trial. Specifically, the defendant avers that the state knowingly introduced the false testimony of a police officer, who recounted Melvin Ellison's testimony at the defendant's preliminary hearing. According to the officer, Mr. Ellison testified at the preliminary hearing that he brought the handgun to the defendant's residence, told the defendant about the gun, and gave it to the defendant.

At trial, the trial court conducted a jury-out hearing at defense counsel's request to discuss the matter of Melvin Ellison's role in the instant crime. When the police searched the defendant's residence, Mr. Ellison was present and claimed ownership of a crack pipe that the police discovered in the course of their search. After arresting Mr. Ellison for possession of drug paraphernalia, the police discovered the handgun and arrested the defendant for possession of a handgun by a convicted felon. When both Mr. Ellison and the defendant were in jail, Mr. Ellison claimed ownership of the gun and reported this information to defense counsel. Subsequently, according to a preliminary hearing transcript filed after the case was on appeal, Mr. Ellison testified at the defendant's preliminary hearing, where he again claimed ownership of the gun. At the preliminary hearing on cross-examination,[1] Mr. Ellison testified that four or five days prior to the defendant's arrest, he discovered the gun by some nearby railroad tracks when he was bicycling to the defendant's residence. At the defendant's request, he had been house-sitting for the defendant while the defendant was at work.[2] When Mr. Ellison arrived at the defendant's residence, the defendant was leaving for work, and Mr. Ellison did not show him the gun, which was concealed in his pants. Mr. Ellison maintained that he had placed the gun in a basket in the defendant's bedroom when he was watching television there and that he had forgotten about the gun because he had discovered it was inoperable and therefore deemed it useless. Mr. Ellison also maintained in the preliminary hearing that he did not show the defendant the gun after he discovered it and that the defendant "didn't know anything about it."

At trial, the court conducted a jury-out hearing to determine whether the jury should be allowed to hear evidence that Mr. Ellison had confessed to and was being prosecuted for the crime for which the defendant was also charged. After a proffer in which defense counsel questioned a police officer about these matters, the trial court determined that defense counsel could elicit from the testifying police officer that Mr. Ellison confessed to and was being prosecuted for his illegal

[1] The cross-examination was conducted by the same prosecutor who participated in the defendant's trial.

[2] Apparently the defendant's house had been recently burglarized. Therefore, the defendant made arrangements with Mr. Ellison to house-sit while the defendant was at work each day.

possession of the handgun. The court determined that such statements were not hearsay and that, therefore, Mr. Ellison's testimony was not required to introduce this evidence. Thereafter, however, the police officer testified on re-direct examination as follows:

Q: This Clifton Ellison – what's his first name, that person that you said admitted that –
A: Melvin Ellison.
Q: Melvin Ellison. Is he a convicted felon also?
A: To my knowledge, yes.
Q: All right. And this took place in the General Sessions court where he made the statement?
A: Yes.
Q: And you were there?
A: Yes.
Q: Tell us what statements he made.
A: He got up and testified that he found a gun at some railroad tracks and kept it on him for a little while; ended up back at Mr. Robinson's; they fooled with it some, and then he gave it to Mr. Robinson.
Q: I think he was actually a witness called by Mr. Robinson; is that correct?
A: Yes.
Q: You said that he said that he and – that Mr. Robinson and Mr. Ellison fooled with it some; is that correct?
A: Yes.
Q: And then he gave it to Mr. Robinson; is that right?
A: That's correct.

On re-cross examination, the following colloquy transpired:

Q: Officer, when did that preliminary hearing take place, do you remember?
A: I don't know the date.
Q: Well, in any event, it was some time ago; it was quite a few months ago, correct?
A: Yes.
Q: Are you absolutely sure that Mr. Ellison said that he gave the gun to Mr. Robinson?
A: Yes.
Q: So if we went and got the tapes of the preliminary hearing, you're absolutely positive that that would be on there?
A: Yes.

The defendant alleges that this evidence demonstrates that the state introduced false testimony. The state avers that the defendant has waived this issue by failing to make a contemporaneous objection at trial or to attempt to impeach the witness. Furthermore, the state

asserts that the officer's testimony was not false, but merely "inaccurate," and that the defendant has failed to prove that the prosecutor was aware that the officer's testimony was inaccurate.

The state may not knowingly present false testimony and has an affirmative duty to correct the false testimony of its witnesses. *See Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972); *State v. Spurlock*, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993). The state's failure to correct false testimony of a witness violates due process of law as guaranteed by the United States and Tennessee constitutions. *Giglio*, 405 U.S. at 153-54, 92 S. Ct. at 766; *Spurlock*, 874 S.W.2d at 618. In order to obtain a new trial, the accused must establish that the prosecution presented false testimony, which it knew to be false, and that the testimony was material. *State v. Cureton*, 38 S.W.3d 64, 74-75 (Tenn. Crim. App. 2000). In determining the materiality of the testimony, the inquiry becomes whether a reasonable likelihood exists that the false testimony could have affected the jury's judgment. *See Giglio*, 405 U.S. at 154, 92 S. Ct. at 766.

We first note that although this court had the benefit of reviewing a transcript of the defendant's preliminary hearing digital versatile disc or digital video disc (DVD), counsel only provided the trial court with the untranscribed DVD as an attachment to the motion for new trial. The defendant waived oral argument of the motion, and the brief order denying the motion does not reveal whether the trial court reviewed the DVD. Accordingly, the state of the record before this court is not the same as the state of the record before the trial court. *See, e.g.*, *State v. Brigitte Pauli*, No. M2002-01607-CCA-R3-CD, slip op. at 1-2 (Tenn. Crim. App., Nashville, June 5, 2003) (in preface to opinion noting the difficulty of deciphering the evidence presented in a complex, multi-day trial without the benefit of a transcript of the video-taped trial); *State v. Michael Wayne Henry*, No. 02C01-9611-CC-00382, slip op. at 4 (Tenn. Crim. App., Knoxville, May 29, 1997) (holding that when a tape-recording is introduced into evidence but not played for the jury, the contents of the tape are not in evidence). In this situation where the record does not reflect that the trial court reviewed the content of the preliminary hearing testimony and only the physical DVD was placed into the new-trial-motion record, the "exhibit" was not itself communicative. On appeal, however, the defendant moved this court to allow a supplementation of the appellate record, and we granted leave to supplement the record with, *inter alia*, a transcript of the preliminary hearing. The transcript, however, being itself communicative, would afford us a view of evidence that may not have been viewed by the trial court.

Nevertheless, even if we were in a position to consider the preliminary hearing transcript as evidence presented in the motion for new trial, the transcript merely reveals the use of inaccurate testimony at trial. The presentation of inaccurate testimony by a state's witness does not equate to a showing that the state knowingly sponsored false testimony. As mentioned above, a transcript of the defendant's preliminary hearing was not prepared until this case was appealed. We discern that there is a significant possibility that the memories of both the prosecutor and the testifying witness were faulty, as several months had passed from the date of the defendant's preliminary hearing to the date of trial. Accordingly, the defendant has not established that the state *knowingly* presented material false testimony, *see Cureton*, 38 S.W.3d at 74-75, thereby entitling him to a new trial.

Propriety of Statement Made During State's Closing Argument

The defendant argues that a statement made by the prosecutor during closing arguments was improper and highly prejudicial and, therefore, prosecutorial misconduct. Specifically, the defendant takes issue with the following statement made during closing arguments: "[Y]ou know, what two convicted felons are doing associating with one another is beyond me, but that's what was going on." The defendant asserts that through this remark, the prosecutor improperly injected his personal opinion and insinuated that the association of two convicted felons indicated a high likelihood of illegal activity. The defendant further argues that he was prejudiced by this statement as it contributed to the jury's determination of guilt. The state counters that the defendant has waived consideration of this issue on appeal because he did not object to the statement when it was made at trial, move for a mistrial, or request a curative instruction. Furthermore, the state asserts that the defendant admits that the prosecutor's remark was "fleeting," and the defendant has failed to prove how he was prejudiced by the statement.

As the state correctly notes, the defendant did not object to the prosecutor's reference to the association of two convicted felons during the state's closing argument. Absent such contemporaneous objection, a defendant waives the issue for appellate review. *See* Tenn. R. App. P. 36(a); *State v. Little*, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992). Appellate relief is generally not available when a party has "failed to take whatever action was reasonably available to prevent or nullify the harmful effect of any error." Tenn. R. App. P. 36(a); *see State v. Killebrew*, 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988) (holding that waiver applies when the defendant fails to make a contemporaneous objection).

Furthermore, we discern no reversible error. "In determining whether statements made in closing argument constitute reversible error, it is necessary to determine whether the statements were improper and, if so, whether the impropriety affected the verdict." *State v. Pulliam*, 950 S.W.2d 360, 368 (Tenn. Crim. App. 1996). In connection with this issue, we must examine the following factors: "(1) the conduct complained of viewed in context and in light of the facts and circumstances of the case[;] (2) the curative measures undertaken by the court and the prosecution[;] (3) the intent of the prosecutor in making the statement[;] (4) the cumulative effect of the improper conduct and any other errors in the record [; and] (5) the relative strength or weakness of the case." *Id.* (quoting *Judge v. State*, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)). We note that the prosecutor's remark was "fleeting" and an isolated comment, rather than a stream of commentary throughout the state's closing argument. Moreover, we find that the state's case was relatively strong, as evidenced by the numerous rounds of .22 caliber bullets found throughout the defendant's residence, by the defendant's informing the police that he exclusively used his bedroom where the handgun was found, and by his statement to the police in which he informed them that the gun was inoperable. Accordingly, this issue does not entitle the defendant to relief.

In conclusion, none of the defendant's allegations merit relief, and the judgment of the lower court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE